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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92058621
Party	Plaintiff Thru, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

**In the Matter of Registration No. 4,478,345 DROPBOX**

<hr/>	§	
THRU INC.,	§	
Petitioner,	§	
	§	
v.	§	Cancellation No. 92058621
	§	
DROPBOX, INC.,	§	
Registrant.	§	
<hr/>	§	

TO THE HONORABLE TRADEMARK TRIAL AND APPEAL BOARD

**PETITION’S REPLY TO REGISTRANT’S RESPONSE TO PETITIONER’S MOTION  
TO STRIKE THE SEVENTH AFFIRMATIVE DEFENSE OR, IN THE ALTERNATIVE,  
FOR A MORE DEFINITE STATEMENT**

Registrant’s Seventh Affirmative Defense consists of an allegation of fraud.

The Federal Circuit has made clear that such a pleading is subject to the heightened standard of Rule 9(b). *Exergen Corp. v. Wal-Mart Stores*, 575 F.3d 1312 (Fed. Cir. 2009). While *Exergen Corp.* was a patent case, the requirement to plead the “time, place and content” or “who, what, where and when” of the allegedly false or fraudulent representation apply equally in the present case.

A trademark registrant filed a petition with the PTO declaring that, to the best of its knowledge, no third party had the right to use the mark “SPEEDY MUFFLER KING” or a confusingly similar mark. *King Automotive, Inv. v. Speedy Muffler King, Inc.*, 667 F.2d 1008, 1010 (C.C.P.A. 1981). A competitor then sought to cancel the mark under § 38 of the Lanham Act alleging, among other things, that the registrant’s statement was “known...to be untrue” and was made with “intent to deceive” the PTO because the

registrant had previously obtained a trademark search report showing a third party's use of a confusingly similar mark, namely, "MUFFLER KING." *Id.* at 1009 & n. 3. The C.C.P.A. found this pleading deficient under Rule 9(b), holding:

Event if the disclosures in the trademark search report supported appellant's contention that [the registrant] *knew* of the alleged third-party use of MUFFLER KING (and on this point we express no opinion), appellant's conclusory statement that [the registrant] *knew* its declaration to be untrue is not supported by a pleading of any facts which reflect [the registrant's] *belief* that the respective uses of MUFFLER KING and SPEEDY MUFFLER KING would be likely to confuse.

*Id.* at 1011 (emphasis added).

The current pleading, which does not identify a particular statement, or contain any factual allegation as to the intent component of fraud, is insufficiently detailed to meet the Rule 9(b) standard. Registrant's claim that it will develop the necessary facts during discovery is unavailing. The necessary detailed facts must be set out in the pleading.

Dated: April 15, 2014

Respectfully submitted,

/s/ John M. Cone

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ATTORNEY FOR PETITIONER  
THRU INC.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 15th day of April, 2014, a true and correct copy of the foregoing document was served via U.S. First Class Mail, postage prepaid on:

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